

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

TROY ANTHONY HESS,)	
)	
Petitioner,)	4:03cv3318
)	
vs.)	MEMORANDUM AND ORDER
)	
HAROLD W. CLARKE,)	
)	
Respondent.)	

This habeas corpus case is before the court on the following pending matters: (1) filing no. 34, the court's Amended Progression Order; (2) filing no. 35, the Motion to Withdraw filed by David L. Nich, Jr., the retained attorney for the petitioner, Troy Anthony Hess; and (3) filing no. 37, the petitioner's letter of March 20, 2006, docketed by the Clerk of Court as an Objection to the Motion to Withdraw, or in the Alternative, Motion for Appointment of Counsel, and Motion for Extension of Time and Motion for Leave to File Pro Se Brief Instantly. In filing no. 34, the Amended Progression Order, I directed the parties to submit briefs on the merits of the petitioner's habeas corpus claims and the respondent's defenses, if any, other than the statute of limitations. Therefore, I ordered the parties to file briefs on the following schedule:

1. By March 17, 2006, the petitioner shall file a brief on the merits of his habeas corpus claims;
2. By April 21, 2006, the respondent shall file a brief in response to the petitioner's claims and on any affirmative defenses other than the statute of limitations; and
3. By May 19, 2006, the petitioner shall file a brief in further support of his habeas corpus claims, in response to the respondent's affirmative defenses, and in reply to the respondent's brief.

Filing nos. 35 and 37 indicate that the petitioner and his retained attorney have a dispute regarding the attorney's representation. At a minimum, however, the attorney failed to file a brief with this court by March 17, 2006. As the attorney did not do so, and as the

petitioner has prepared and submitted a thorough and competent brief, the petitioner's Motions for Extension of Time and for Leave to File Pro Se Brief Instanter are granted. Therefore, filing no. 36, the petitioner's "Brief in Support of Amended Petition for Writ of Habeas Corpus" is accepted for filing instanter.

Because the petitioner's brief was filed with the court on March 22, 2006, instead of March 17, 2006, albeit through no fault of his own, the respondent shall have an additional five (5) days to file his brief. Therefore, filing no. 34 is modified to change the deadline for the respondent's brief from April 21, 2006 to April 26, 2006.

Mr. Nich's Motion to Withdraw is denied because Mr. Nich has not explained the basis for his motion, and the representation of the petitioner is almost at an end. At this time, therefore, the petitioner's Objection to the Motion to Withdraw is sustained.¹ However, this court cannot grant any relief regarding the compensation paid by the petitioner or his family to the attorney. That is a matter to be taken up in an appropriate forum such as a state court. In addition, the only action by the petitioner which remains to be accomplished is the reply brief due by May 19, 2006.

I will change the deadline to May 31, 2006 for the petitioner's reply brief, and I will direct Mr. Nich to prepare a draft of that brief and submit the draft to the petitioner by May 19, 2006. Upon receipt of Mr. Nich's draft, the petitioner may decide whether or not to require Mr. Nich to file a final form of the draft brief or, in the alternative, the petitioner may elect to file his own reply brief. Any brief should be mailed (postmarked) by no later than May 31, 2006.

THEREFORE, IT IS ORDERED:

1. That filing no. 34, the court's Amended Progression Order, is modified as follows:

¹If Mr. Nich believes ethical concerns preclude his further involvement in this case, he may file another motion to withdraw. However, if any such motion is predicated upon ethical concerns, Mr. Nich shall file an affidavit under seal briefly describing the nature of his ethical concerns. The affidavit may be submitted ex parte, i.e., it may be delivered only to the court and not served upon the petitioner or counsel for the respondent. However, delivery to the court must be by filing on the court's CM/ECF electronic filing system, which accommodates the filing of sealed documents.

- a. By April 26, 2006, the respondent shall file a brief in response to the petitioner's claims and on any affirmative defenses other than the statute of limitations; and
 - b. By May 31, 2006, the petitioner shall file a brief in further support of his habeas corpus claims, in response to the respondent's affirmative defenses, and in reply to the respondent's brief;
2. That filing no. 35, the Motion to Withdraw filed by David L. Nich, Jr., the retained attorney for the petitioner, Troy Anthony Hess, is denied, without prejudice;
 3. That filing no. 37, the petitioner's Objection to the Motion to Withdraw, or in the Alternative, Motion for Appointment of Counsel, and Motion for Extension of Time and Motion for Leave to File Pro Se Brief Instantly, is granted in part and denied in part, as follows:
 - a. Filing no. 36, the petitioner's "Brief in Support of Amended Petition for Writ of Habeas Corpus," is accepted for filing instantly;
 - b. This court cannot grant any relief regarding the compensation paid by the petitioner or his family to the attorney, and the petitioner may pursue that matter in an appropriate forum;
 - c. The petitioner's Objection to the Motion to Withdraw is sustained; Mr. Nich shall prepare a draft of the petitioner's reply brief and shall ensure that the draft is *received* by the petitioner by no later than May 19, 2006;
 - d. Upon receipt of Mr. Nich's draft, the petitioner may decide whether or not to require Mr. Nich to file a final form of the draft brief or, in the alternative, the petitioner may elect to file his own reply brief and/or attach the attorney's brief as an addendum to his own brief; in any event, the final reply brief shall be mailed (postmarked) by no later than May 31, 2006.

March 30, 2006.

BY THE COURT:

/s Richard G. Kopf
United States District Judge